

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**THE DETROIT NEWS, INC., and  
DETROIT NEWSPAPER PARTNERSHIP, L.P., a limited partnership, a/k/a  
DETROIT MEDIA PARTNERSHIP AND DETROIT FREE PRESS, INCORPORATED,  
general partner**

Respondents

and

CASE 07-CA-132726

**THE DETROIT FREE PRESS, INCORPORATED, and  
DETROIT NEWSPAPER PARTNERSHIP, L.P., a limited partnership, a/k/a  
DETROIT MEDIA PARTNERSHIP AND DETROIT FREE PRESS, INCORPORATED,  
general partner**

Respondents

and

CASE 07-CA-132729

**NEWSPAPER GUILD OF DETROIT, LOCAL 34022  
OF THE NEWSPAPER GUILD/CWA, AFL-CIO,  
Charging Union**

*Ingrid L. Kock, Esq.,  
for the General Counsel.*

*L. Michael Zinser and Glenn E. Plosa, Esqs. (The Zinser Law Firm),  
for the Respondent Detroit Free Press and  
Respondent Detroit Media Partnership.*

*Robert M. Vercruysse, Esq. (Vercruysse, Murray and Calzone),  
for the Respondent Detroit News.*

*Duane F. Ice, Esq.,  
for the Charging Union.*

**DECISION**

**STATEMENT OF THE CASE**

SUSAN A. FLYNN, Administrative Law Judge. This case was tried in Detroit, Michigan, from February 2-5, 2015.<sup>1</sup> The Charging Union filed the charges on July 14, 2014, and the General Counsel issued the complaints on October 31, 2014. The complaints allege that the Respondents violated Section 8(a)(5) and (1) of the Act when they bypassed the Union and

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<sup>1</sup> The Respondent's unopposed motion to correct the transcript is granted.

engaged in direct dealing with bargaining unit members by issuing directly to bargaining unit members notice of the new parking policy without giving the Union prior notice and an opportunity to bargain and issuing directly to bargaining unit members notice of the extension of the deadline to submit parking preferences. The complaints also allege that the Respondents failed to bargain with the Union about the effects of the decision to relocate the businesses, specifically the parking policy. The Respondents filed answers denying all material allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondents, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

#### *Respondent Detroit Free Press*

Respondent Detroit Free Press (Respondent DFP) is a corporation with an office and place of business in Detroit, Michigan, and publishes The Detroit Free Press, a daily newspaper.

In conducting its operations during the calendar year ending December 31, 2013, Respondent Detroit Free Press held membership in and subscribed to various interstate news services, including The Associated Press, and advertised various nationally sold products, including Ford Motor Company automobiles, that generated revenues payable to the Detroit Media Partnership, pursuant to the Joint Operating Agreement

Pursuant to the Joint Operating Agreement, the DFP received from revenues collected by the DMP over \$200,000 for newsroom expenditures, including wages for the DFP employees, during calendar year 2013.

#### *Respondent Detroit News*

Respondent Detroit News (Respondent DN) is a corporation with an office and place of business in Detroit, Michigan, and publishes The Detroit News, a daily newspaper.

In conducting its operations during the calendar year ending December 31, 2013, Respondent Detroit News held membership in and subscribed to various interstate news services, including The Associated Press, and advertised various nationally sold products, including Ford Motor Company automobiles, that generated revenues payable to the Detroit Media Partnership, pursuant to the joint operating agreement.

Pursuant to the joint operating agreement, the DN received from revenues collected by the DMP over \$200,000 for newsroom expenditures, including wages for the DN employees, during calendar year 2013.

*Respondent Detroit Media Partnership*

5 Detroit Newspaper Partnership, L.P., is also known as Detroit Media Partnership (Respondent DMP). Respondent DMP is a limited partnership, with an office and place of business in Detroit, Michigan, and is engaged in facility management, human resources and labor relations administration of Respondents Detroit News and Detroit Free Press.

10 Respondent DMP is a limited partnership doing business as The Detroit News, Inc. and The Detroit Free Press. The Detroit Free Press is the general partner, and the Detroit News is a limited partner.

15 During the calendar year ending December 31, 2013, Respondent DMP derived gross revenues in excess of \$200,000, and purchased and received at its Detroit facility goods and materials valued in excess of \$50,000 directly from points outside the State of Michigan.

The Respondents admit, and I find, that each is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

20 I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

*A. The Parties' Relationships*

25 The Detroit News and the Detroit Free Press are competing newspapers, with different owners. Since 1989, they have been operating under a Joint Operating Agreement (JOA), pursuant to which they maintain separate newsrooms and editorial staffs, and publish separate papers. Their business functions are managed by the Detroit Media Partnership. (Jt. Exh. 3.)

The JOA provides as follows, in pertinent part:

35 On and after the Effective Date, the Partnership shall control, supervise, manage, and perform all operations (other than the news and editorial operations) of the Detroit News and the Detroit Free Press involved in producing, printing, selling, marketing, and distributing the Newspapers ... (including that it) shall provide or make available to each Newspaper such parking ... as the Partnership deems reasonable and appropriate ... and shall make all determinations and decisions and do any and all acts and things necessarily connected with the foregoing activities ...  
40 [Jt. Exh. 3]

45 The parties stipulated that DMP acted as agent for DN and DFP, specifically with regard to the parking policy changes announced on June 16, 2014, and the communications to employees regarding parking policy changes. (Tr. 597.)

Paul Anger is the editor and publisher of the Detroit Free Press. Jonathan Wolman is the Editor and Publisher of the Detroit News.

Joyce Jenereaux is the regional president of DMP; Jeffrey Lefebvre is Regional Director/HR Business Partner; Kristie Plain (Bowden) is group director/HR business partner; and Mark Brown is vice president of finance.

The Union has been recognized by both the Detroit Free Press and the Detroit News as the exclusive collective-bargaining representative for these units. Each newspaper has a separate collective-bargaining agreement with the Union, each with different terms. The most recent collective-bargaining agreements for both are effective February 24, 2013 through February 23, 2016. (Jt. Exh. 1 and 2)

The bargaining unit at the Detroit Free Press is defined as:  
All full-time and regular part-time news and editorial employees, including editorial aides, editorial interns, editorial research assistants, artists, copy editors, reporters, photographers, designers, web producers, photo lab assistants, assistant editors, head copy editors, picture editors, editorial writers, web editors, and web developers.

The bargaining unit at the Detroit News is defined as:  
All full-time and regular part-time news and editorial employees, including reporters, photographers, artists, copy editors, digital editors, rewrite employees, page designers, wire editors, picture supervisors, degree librarians, editorial assistants, secretaries, clerks and student interns.

Prior to the relevant time period, Louis Mleczo was the union president and administrative officer for the Newspaper Guild of Detroit. Mleczo was administrative officer until August 1, 2013, and president until February 2014. Lou Grieco succeeded Mleczo as administrative officer; John Gallagher succeeded him as union president. John Gallagher was also DFP unit chair; Kim Storeygard was DN unit chair.

### *B. History of Parking*

Prior to the 1989 JOA, employees who drove to work were required to make their own arrangements for parking. However, the 1989 JOA required the Partnership (DMP) to make parking available for employees.

Initially, parking cost \$1 per day for DFP employees, when the DFP was located at 321 W. Lafayette Street. That fee was paid per day, and only on days when the employee parked there. In 1998, the DFP moved to 615 W. Lafayette, known as the Detroit News Building where the DN and DMP were already housed. (Tr. 397.) The parking lot associated with 321 was closed.

### *C. Parking at 615 W. Lafayette Street*

From 1998 to 2014, all three Respondents operated their newspaper businesses from 615 W. Lafayette Street in downtown Detroit. DMP owned the building as well as parking lots

adjacent to that building and in the vicinity, where employees could park - a nine-floor garage adjacent to the building and two surface lots, at Third and Lafayette, and Third and Fort. Employees who elected to park in one of these lots were charged \$30 a month to park in the garage and \$25 a month to park in the two outdoor lots. Those fees were deducted from employees' paychecks, on a pretax basis. (Tr. 258, 398, 399, 544, 555, 795, 796, 798, 808.) The change in parking fees and arrangements for DFP employees when they relocated from 321 was not negotiated with the Union and the Union made no request to bargain about it. (Tr. 796.)

On January 9, 2014, it was announced that the lot at Third and Fort Streets was closing. (DFP Exh. 5.) On January 10, Grieco emailed Mark Brown, DN Editor Jonathan Wolman, DFP Editor Paul Anger, and DMP Human Resource Manager Kristi Plain regarding employee concerns, especially as to security. (DFP Exh. 6.) Brown responded by forwarding to Grieco an email that had previously been sent to all employees. (DFP Exh. 5(b), 6(e).) On January 10, Grieco thanked Brown for answering his questions. (DFP Exh. 6(h).) He did not request bargaining over that lot closure.

Later in 2014, the building at 615 W. Lafayette and the two associated parking lots were sold. The Respondents made plans to move several blocks away, to 160 W. Fort Street.

#### *D. Union Requests Regarding Parking at the New Building*

In anticipation of that move, John Gallagher, DFP unit chief had conversations with DMP Regional President Joyce Jenereaux and DFP Editor Paul Anger regarding parking, stating that employees were concerned about how parking arrangements and costs would change after the move. They responded that it was being studied and a plan would be forthcoming. (Tr. 660, 661.)

On June 10, Grieco wrote to Anger as well as Wolman and Plain regarding any upcoming parking changes. He also posed questions related to parking at the new building. As you can probably imagine, our members are quite concerned about parking after the move, which is only three months away. Of course, the Guild has the right to bargain the effects of the move, which would include any change in parking arrangements or costs.

...

- (1) How and where will parking be provided for employees after the move?
- (2) Will the parking be ADA compliant?
- (3) How far will the parking lots or areas be from the new building?
- (4) Will shuttle service be provided?
- (5) What safety measures will be provided at the lots/garages?
- (6) What will happen with the old lot? Will people still be able to park there?
- (7) How much will parking cost employees going forward and how much of an increase will that be?

[Jt. Exh. 4]

Plain asked DMP Vice President Jeffrey Lefebvre to coordinate a response with William Behan, Gannett's vice president for labor relations. (Jt. Exh. 4, Tr. 868.) The next day, Lefebvre called Grieco but stated that he was not prepared to answer his questions. He sent a confirming email, stating, "(p)er our discussion, we are not prepared to answer these questions at this time, but will let you know once we are prepared." (Tr. 400, Jt. Exh. 5.)

*E. Respondents' June 16 Emails Announcing New Parking Policy*

On June 16, 2014, Jenereaux sent an email to all employees<sup>2</sup> explaining the new parking policies and procedures for requesting parking.

Here's how we'll handle parking for our new building.

We have reserved spaces in two parking garages near our new building at Fort and Shelby streets, and have negotiated favorable rates for parking. The Financial District Garage is directly behind our new building, with an enclosed walkway that connects it to the mezzanine level of our building. The First Street Parking Garage is three blocks away, at First and Fort streets. You'll soon be able to request parking spaces in either of these garages, but we cannot guarantee you'll get your first choice location.

Anyone who would like a walking escort to or from his or her vehicle will be able to have one at any time by contacting our new building security service.

The company will be absorbing some of the costs of parking. The monthly rates you'll pay to park will depend upon the garage you select (the garage adjacent to the building will be more expensive) and your income (higher compensated people will pay higher rates).

Monthly rates will range from \$60 (for an employee in the lower end of our pay range who parks in the First Street garage) to \$175 (for a highly compensated employee who parks in the Financial District Garage). These amounts will be taken from your paycheck on a pre-tax basis, which will save most people money on their federal income taxes. More details about your parking options are attached.

You are under no obligation to rent a parking space through the company. You are free to make your own arrangements that better suit your needs. To help you decide, I have attached information about alternatives to renting a company-administered spot: Buses, van pools, car pools, parking in less expensive distant lots, taking the People Mover,<sup>3</sup> and other options. We will soon announce a schedule of employee meetings with representatives from SMART, D-DOT, and SEMGOG (the regional planning group that operates a van pooling program, and will help match you with others in your area who might want to car pool). Please remember that our new location will be much closer to bus stops in the heart of downtown than our current location. We will also be making our Sterling Heights facility parking lot available for employees to create their own park and ride arrangements.

I've also attached a list of daily-rate lots near our building. These may be a good alternative for you if you don't have to work out of the downtown office every day.

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<sup>2</sup> This email, as well as subsequent all-employee emails, were sent to all employees of DFP, DN, and DMP.

<sup>3</sup> A light rail elevated train that operates on a single rail, circling the downtown area.

***On Monday, July 7, you'll be asked to sign up for one of our parking options or indicate that you are declining to participate. So this is the time for you to explore your options.*** If you are unprepared to make a parking decision at that time, you will be limited to whatever spaces are available when you submit your parking request.

I know this will add to your expenses at a time in which many are already feeling financially strained. But after many years in which the company has provided company-owned parking facilities at a small fraction of the going rate, we're now facing the same issues that impact most everyone who works downtown.

If you have questions about your parking options – or alternatives to renting a space – please contact Richard Karstensen, DMP purchasing manager....

[Jt. Exh. 6]

Attached to that email were a map of downtown Detroit (showing other garages and People Mover stops) and SMART system maps (bus lines).

Jenereaux did not send a copy of the email to Grieco or any other union representative (i.e., Union President/DFP Unit Chair John Gallagher or DN Unit Chair Kim Storeygard, or Vice Chair Kristin Tanner or bargaining committee member Dianne Weiss or steward Patty Montemurri at the Detroit Free Press) in advance of the mass mailing, nor discuss the subject matter of the email with any of those individuals, nor was it sent to any union representative in their official capacity (i.e., Union President Gallagher or Unit Chair Storeygard or Vice Chair Tanner).<sup>4</sup> The emails were sent to DFP-ALL, DN-ALL, and DMP-ALL, but not to any group as union representatives.

That same day, DMP Vice President Mark Brown sent another email to all employees providing more detailed information about parking at the new building. We have secured parking spaces in two garages for our planned move to the Federal Reserve Building, located at the corner of Fort and Shelby streets. We have negotiated discounted rates in these garages, based upon the large number of spaces we are reserving.

One location is the Financial District Garage, located directly behind our new building. It is attached to our building via a mezzanine-level walkway. The second location is the First Street Parking Garage, at the corner of Fort and First streets, a three block walk from our new facility.

Both garages operate similarly. Each controls access with a card system for those paying monthly (as we will be). The Financial District Garage has attendants staffing the entrance gates from 6 a.m. to 10 p.m. and is accessible during all other hours by using an access card that raises and lowers a door/gate. The First Street Garage's attendants are on duty from 6 a.m. until 11 p.m., and then access is available during all other hours by using a card.

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<sup>4</sup> I decline to draw an adverse inference as requested by the General Counsel, for the Respondents' failure to call Jenereaux as a witness, as it is unnecessary.

A free security escort walking service—to or from your parking location – will be available for anyone who requests this service at any time.

5 Downtown employees will be asked on July 7 to provide their first choice and second choice parking locations (selecting between the two garages previously mentioned) or to opt-out of the company-provided parking options.

10 While we have enough spaces between the two garages to accommodate all who will request a space, there may not be enough spaces in your preferred location. If demand for spaces in either of the garages is greater than the supply, some people will be assigned to their second choice location. Spaces in each garage will be assigned based upon the following criteria:

15 (1) Because spaces in the First Street Garage are the least expensive option, they will be assigned on the basis of total 2013 annual compensation, giving preference to those in the lower pay ranges. We will fill this garage with employees who choose this ***as their first option***, starting with the lowest-paid employees, and continuing to assign spaces in the order of annual compensation  
20 until the spaces are exhausted.

(2) Spaces in the Financial District Garage will be assigned on the basis of seniority. We will fill this garage with employees who choose this ***as their first option***, starting with the most senior employees, and continuing down the  
25 seniority list until all spaces are filled. The one exception to this rule is that anyone with a valid state handicapped parking permit will be placed at the top of the priority list for this garage. Handicapped parking (on a first-come, first-served basis) is available on all floors, adjacent to the elevator.

30 Your parking selection will remain in effect for one year from the date of our move. At that point, you may request a change in your parking arrangement or opt out of company-provided parking options.

### *Parking Prices*

35 *If you are assigned a space in the First Street Garage –*

#### *Monthly*

40	Compensation Range	Employee Pays	Company Pays	Cost of Space
	Up to 55,000	\$60	\$70	\$130
	55,001 to 75,000	\$80	\$50	\$130
	75,001 to 100,000	\$90	\$40	\$130
45	100,001 and over	\$130	0	\$130

*If you are assigned a space in the Financial District Garage –*

Compensation Range	Employees Pays	Company Pays	Cost of Space
Up to 55,000	\$105	\$70	\$175
55,001 to 75,000	\$125	\$50	\$175
75,001 to 100,000	\$135	\$40	\$175
100,001 and over	\$175	0	\$175

As with the current parking arrangement, the company will deduct your parking costs from your check in pre-tax dollars, which will save most people money on their federal income taxes. No refunds will be provided for days on which you are out of the office for any reason.

Free bicycle parking will be available in the Financial District Garage. If you ride a motorcycle, you will be subject to the same provisions as those who drive automobiles and trucks.

Questions about your parking options? Contact Richard Karstensen, DMP purchasing manager...

[Jt. Exh. 7]

Brown did not send the email to any union official in advance (Grieco, Gallagher, or Storeygard), nor discuss the subject matter of the email with any of those individuals, nor was it sent to any union representative in their capacity as a union representative.<sup>5</sup>

#### *F. Union Response*

An employee, who is a union member, forwarded the email to Grieco. (Tr. 477.) Upon receipt, on June 16, Grieco wrote to Lefebvre, Jenereaux, Wolman, and Anger, stating

Last week, I sent an email invoking the Guild's right to bargain concerning changes in parking arrangements and costs, and to start, I requested information that would relate to such bargaining. I was told that no information was available, but would become available very soon.

Looks like the information has become available, though the company did not send it to me. Our members, with whom you are directly dealing, have sent it on to me. Direct dealing, of course, improper (sic). We are not conceding that the company may unilaterally determine parking terms and procedures for bargaining unit employees, and we expect bargaining to occur before any future changes. So I am hereby requesting bargaining concerning the parking policy issued to our members today.

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<sup>5</sup> I decline to draw an adverse inference as requested by the General Counsel, for the Respondents' failure to call Brown as a witness, as it is unnecessary.

Besides the cost issues, I can tell you that we are already hearing from unit members regarding other concerns related to the policy, e.g., should those with disabilities be given priority for parking in the closer garage and, if so, will they be forced to pay the highest rates? The same concern exists for photographers who have to carry equipment for work.

Please let me know your availability for bargaining, including some dates that would work for you.

(Jt. Exh. 8, GC Exh. 29)

Lefebvre emailed Grieco the following day, and the two subsequently exchanged emails between June 20 and 26, attempting to set up a date to meet. (Jt. Exh. 10-13, 15-19, Tr. 406, 904.) They agreed to meet at 10 a.m. on July 11.

*G. Respondent's June 23 Email Regarding Alternatives to Parking*

On June 23, Brown's office sent another all-employee email, announcing a June 27 staff meeting to discuss alternative commuting options such as car pooling, van pooling, taking the bus, or riding the People Mover. Attached was a flyer describing those options.

(Jt. Exh. 14)

That email was not sent to Grieco, and no one discussed its contents in advance with him.

*H. Respondent's June 27 Email Announcing Estimated Move Date*

On June 27, Jenereaux sent an all-employee email announcing that, as the old building and parking lots had been sold, the move was anticipated for late September 2014. (Jt. Exh. 21.) That email was not sent to Grieco.

*I. Union Emails Regarding Upcoming Bargaining Meeting*

On June 27, "in anticipation of our upcoming effects bargaining" on July 11, Grieco emailed Lefebvre requesting the following information.

(1) Are these garages open 24 hours a day? On weekends?

(2) Do they have security and attendants all the time?

(3) Are prorated rates available for those who don't plan to be in the office every day/work from home or elsewhere part of the week?

[Jt. Exh. 20]

Grieco sent an email on June 30 to Lefebvre, Jenereaux, Anger, and Wolman requesting an extension of the July 7 deadline for employees to submit their parking requests.

This will give us the opportunity to bargain the issues and perhaps resolve any issues that might affect the employees' decisions. If you will not at least postpone the deadline, we request that the policy and procedure announced in Ms. Jenereaux's email be rescinded and the status quo restored. We are concerned that bargaining after the policy is decided and announced to employees will not be meaningful, and the Company will simply go

through the motions but make no agreements, precisely because the policy has already been unilaterally determined and announced.  
[Jt. Exh. 22]

5 *J. Respondents' Responses to Grieco*

That same day, Lefebvre replied to Grieco, stating that he would work on getting the answers to the questions posed in his June 27 email, and requesting confirmation of the July 11 meeting. (Jt. Exh. 23.) Grieco did confirm the meeting. (Jt. Exh. 24.)

10 On July 1, Lefebvre responded to Grieco's June 30 email, stating that the July 7 deadline for employees to submit their parking choices would be extended. Lefebvre said that "a communication" would be sent out shortly addressing "a number of questions that have been asked" including the deadline extension. He also said he would forward that email to Grieco. (Jt. Exh. 25.)

*K. Respondents' July 2 Emails About Parking*

20 On July 2, Jenereaux sent an email to all employees, subject: More Information About Our Move. She attached an eight-page FAQ (Frequently Asked Questions) about the move, including parking. Therein, she advised employees that the deadline for submitting their parking choices was July 21. (Jt. Exh. 26.)

25 Once again, the email was not sent to Grieco or any other Union representative in advance of the mass mailing. However, Lefebvre forwarded it to Grieco 11 minutes after the mass emailing. (Jt. Exh. 28.)

30 Shortly thereafter, Lefebvre emailed Grieco, responding to the questions Grieco posed on June 27. He said the garages would be open 24 hours and on weekends, attendants were present until 10 p.m. at one lot and 11 p.m. at the other, and that monthly rates would not be prorated. (Jt. Exh. 29.)

35 Later that same day, Brown's office sent an all-employee email regarding parking, noting the July 21 deadline to submit parking preference, the availability of a shuttle service and security escorts, and announcing a repeat of the June 27 meeting discussing commuting options. Attached was a route map and schedule. (Jt. Exh. 27.) That was forwarded to Grieco by Lefebvre after it was sent to the employees. (Jt. Exh. 30.)

40 *L. Respondents' July 7 Email with Parking Election Form*

On July 7, Brown's office sent an all-employee email, enclosing the form for employees to indicate their choice of parking options, as well as another copy of the parking information memo Brown had issued on July 2. (Jt. Exh. 31.)

*M. The Parties' July 11 Meeting*

Representatives from the Union and Respondents met on July 11, 2014. Grieco, Gallagher, and Storeygard attended for Union; for the Respondents, Vercruysse for DN; Behan for DFP; and Lefebvre for DMP. Grieco indicated that the Union requested the meeting because employees were upset about the changes in parking, such as increased cost, safety and security.

The Union presented a written proposal, as follows.

This proposal would amend the current contracts and be in force until new contracts are bargained.

1. There will be no charge for those employees who need to leave the building for assignments, particularly but not limited to reporters and photographers.
2. Those same employees will be assigned spots in the closer parking lot.
3. For remaining employees, the cost will not go above the \$25 they are currently paying.
4. Those with medical conditions/disabilities should be allowed to park in the closer lot.
5. The Company shall keep the current company cars – two for the Free Press and two for the News. These can be used for breaking news assignments should staffers choose to use them, or have to use them in the event their own vehicle is not available.
6. Those who work nightshift shall be allowed to move their cars to the closer lot after 6 p.m. at no extra charge; or will be allowed to park in the closer lot at the minimal charge.

[Jt. Exh. 34]

Grieco also offered two charts reflecting the financial impact of the changes in parking costs on employees. (Jt. Exhs. 32 and 33.)

Grieco stated that he assumed the parking policy that had been announced was the Respondents' initial proposal. However, Behan stated that it was not a proposal; it was the benefit they were offering. (Tr. 422, 640, 786.) He advised the Union of his position that parking was not a subject over which they had an obligation to bargain. (Tr. 872.) He felt that, since parking was not covered by the contracts, and members of the bargaining unit were treated the same as non-bargaining unit members, and that relationship between the parties as to parking was not changing, there was nothing to bargain about. He repeated that they had no obligation to bargain. (Tr. 423, 493–494, 522, 528, 665, 670, 703, 728, 730, 872–873.) Vercruysse agreed on behalf of the Detroit News. (Tr. 495.) Nonetheless, they agreed to discuss the Union's concerns. (Tr. 872–874.) However, Behan rejected the Union's proposals with little discussion, other than to indicate that they had already decided how to handle disabled employees and those with medical conditions, to the Respondents' satisfaction. Behan stated that they intended to allow disabled individuals to park in the closer lot, the Financial District Garage, but at the lower First Street Garage rates. (Tr. 880.) He also stated that, since the Respondents did not own the lots, they could not agree to grant employees the ability to switch lots as requested in Proposal 6. There was discussion about other matters, including security, photographer parking issues due to

heavy and expensive equipment, and company cars, including maintenance. (Tr. 423–426.) The Union then adjourned to another room to caucus. Fairly quickly, they advised the Respondents that there was nothing further to discuss. However, Behan requested that they return to the meeting room. Behan concluded the meeting by stating that the new parking policy would be implemented. (Tr. 640, 664, 685, 704, 730, 883.) Vercruysse stated that employees must sign up for parking by the new July 21 deadline or forfeit the ability to park at either garage for the year. They did say that it was evolving, a work in progress. (Tr. 525–526.) The Respondents offered no proposals. (Tr. 423, 426, 428, 784.)<sup>6</sup>

#### N. Implementation

The parties did not meet or otherwise discuss the new parking policy again. The Union made no further requests to bargain about the parking policy. The new parking policy was effected October 26.

### III. LEGAL STANDARDS AND ANALYSIS

#### A. Did Respondent DMP, as Agent for Respondents DFP and DN, Engage in Direct Dealing by Announcing a New Parking Policy on June 16, 2014, Without Providing the Union Notice and a Meaningful Opportunity to Bargain?

It is well settled that the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees, and that an employer who deals directly with its unionized employees ... regarding terms and conditions of employment violates Section 8(a)(5) and (1). (citation omitted.) Direct dealing need not take the form of actual bargaining. *Allied-Signal, Inc.*, 307 NLRB 752, 754 (1992).

An employer engages in direct dealing when (1) it communicates directly with union-represented employees; (2) the communication is for the purpose of establishing or changing wages, hours, or terms and conditions of employment or undercutting the union's role in bargaining; and (3) such communication is made to the exclusion of the union. *El Paso Electric Co.*, 355 NLRB 544, 545 (2010), citing *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000), *Southern California Gas Co.*, 316 NLRB 979 (1995).

In *Royal Motor Sales*, 329 NLRB 760 (1999), the Board found that the employer had engaged in direct dealing by posting on a bulletin board notice of a new parking policy. There was no prior notice given to the Union. As here, the employer did not bargain or negotiate with employees nor did it seek employee sentiment; it merely announced the policy.

The Board observed in *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41, 42 fn 4 (1997), that "(B)y announcing the new policy to the Union at the same time as all other employees, the Respondent essentially ignored the representative status of the employees' bargaining agent. Such failure to acknowledge the Union's proper role in negotiating terms and

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<sup>6</sup> I decline to draw adverse inferences as requested by the General Counsel for the Respondents' failure to call Lefebvre and Veracruysse, as other witnesses testified to the events.

conditions of employment severely diminished, if not effectively foreclosed, any meaningful opportunity for the Union to exercise its authority in any subsequent discussion of this matter.”

Similarly, in *American Medical Response of Connecticut*, 359 NLRB No. 144, slip op. at 2 (2013), the Board stated that “[A]n employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals,” citing *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001) (quoting *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964)). The employer therein argued that the union received sufficient notice when the employer emailed a draft of the vehicle checklist to the field training officers, who are bargaining unit members. “Notification to unit employees, however, is not equivalent to providing notice to their collective-bargaining representative.” *Bridon Cordage, Inc.*, 329 NLRB 258, 259 (1999). Although these cases involve the obligation to bargain rather than direct dealing, the principles apply to the instant case.

Thus it appears that the Board focuses on whether the employer’s direct communication to employees regarding a mandatory subject of bargaining, without involving the union, erodes the position of the union as designated representative, rather than whether the employer negotiates with the employees or seeks their sentiment on an issue.

Respondents DFP and DMP concede that the June 16 emails to all employees, but not Grieco, were the response to Grieco’s June 10 request. They assert, however, that they were merely exercising their First Amendment right to communicate with their employees by sending those emails. They rely on several cases, including *Gissel Packing Co.*, 395 U.S. 575 (1969) and *Pratt & Whitney*, 789 F.2d 121 (2d Cir. 1986). Those cases do not support the Respondents’ position, but the General Counsel’s. As set forth in *Gissel*, the Act does recognize an employer’s First Amendment right to communicate freely with its employees on a wide range of issues. In *Pratt & Whitney*, the employer’s communication to employees contained no proposal that had not already been presented to the union at the bargaining table. Unlike the situation in *Pratt & Whitney*, DMP herein was not explaining to the employees its position on an issue being negotiated with the Union, or attacking the Union’s position on any issue; there had been no negotiations here and the policy had not previously been provided as a proposal to the Union. The court stated that “(t)he fundamental inquiry is whether the employer has chosen ‘to deal with the Union through the employees, rather than deal with the employees through the Union.’” *Pratt & Whitney*, supra, citing *General Electric*, 418 F.2d 736, 759 (2d Cir. 1969). DMP’s communications were intended to bypass the Union, thus circumventing the bargaining unit members’ Section 7 right to select a representative and bargain collectively. The June 16 emails, combined with the Respondents’ refusal to engage in effects bargaining with the Union as requested, instead unilaterally announcing and implementing the new parking policy, constitutes direct dealing.

The Respondents assert that although the all-employee emails were not sent to Grieco, they were sent to various Union representatives, including Gallagher, Storeygard, and Tanner. However, those individuals received the emails as employees of the Respondents, not in their capacity as Union representatives, and, more importantly, they did not receive them in advance of the mass mailing. See *Aggregate Industries*, 359 NLRB No. 156, slip op. at 6 (2013). The situation in *Carey Salt, Inc.*, 360 NLRB No. 38, slip op. at 12 (2014), is somewhat akin to the instant case. Therein, the employer notified the union 2 weeks in advance of a planned change in

employees' wages, and sent that notification on the same day it sent notice to the employees. Judge Locke found that that notice was purely informational, that the employer presented the union with a fait accompli, and the employer's action showed that it had no intention of bargaining with the union.

When the June 16 emails were sent, Respondent DMP was not bargaining with unit members about parking, seeking their input regarding proposed parking changes, or gauging their sentiment regarding those changes. Indeed, the purpose of the June 16 communications was merely to announce a new parking policy that had already been decided upon. However, those communications regarding the new parking policy were sent directly to the unit members, bypassing the Union and undercutting the role of the Union. That action clearly demonstrated DMP's intent to ignore the Union, especially given that Grieco had requested that information, had invoked the right to engage in effects bargaining, and had had conversations with Lefebvre about the subject of parking.

I find, therefore, that Respondent DMP, as agent for Respondents DFP and DN, did engage in direct dealing when it sent the June 16 emails regarding the change in parking policy to the bargaining unit members without providing the Union notice and a meaningful opportunity to bargain.

Therefore, I conclude that Respondent DMP, as agent for Respondents DFP and DN, violated Section 8(a)(5) and (1) of the Act as alleged.

B. Did Respondent DMP, as Agent for Respondents DFP and DN, Bypass the Union and Deal Directly with Unit Members When it Announced the Deadline Extension By Email on July 2, 2014?

The legal standards set forth above apply to this issue as well.

On June 30, Grieco emailed Jenereaux, Wolman, and Anger, requesting an extension of the July 7 deadline for employees to submit their parking preferences. On July 1, Lefebvre responded that the deadline would be extended, and the date would be communicated in a subsequent email. He did not ask for any input from Grieco as to a new date. Then, on July 2, Jenereaux sent an all-employee email with additional parking information, including a new deadline of July 21 to submit parking preferences. That email was not simultaneously sent to Grieco. Lefebvre forwarded it to him 11 minutes later.

Meeting a deadline for submitting parking preferences was a new requirement. Making that election locked the employee in for 1 year, while they had previously only committed for 1 month. By making a parking selection, the employee was also agreeing to pay the stated monthly amount for the parking space. I find, therefore, that the deadline was material, substantial, and significant, and thus a mandatory subject of bargaining.

The Respondents contend that forwarding the email to Grieco afterwards was sufficient to meet any obligation to notify the Union. However, whether the email was forwarded to Grieco within minutes or hours or days of issuance to the employees is immaterial. The fact remains

that DMP sent an email regarding a mandatory subject of bargaining directly to the employees, and did not notify the Union in advance, much less consult with Grieco regarding the new date.

I find, therefore, that Respondent DMP, as agent for Respondents DFP and DN, did engage in direct dealing when it bypassed the Union and sent the July 2 email to bargaining unit members advising them of the new July 21 deadline to submit their parking preferences.

Therefore, I conclude that Respondent DMP, as agent for Respondents DFP and DN, violated Section 8(a)(5) and (1) of the Act as alleged.

C. Did Respondent DMP, as Agent of Respondents DFP and DN, Violate the Act By Making a Unilateral Change That Was Material, Substantial, and Significant When The New Parking Policy Was Announced on June 16, 2014, and Implemented in October 2014?

An employer violates Section 8(a)(5) and (1) of the Act if it changes the wages, hours or terms and conditions of employment of represented employees without providing the Union with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 743, 747 (1962). Those changes are mandatory subjects of bargaining if the change has a “material, substantial, and significant” impact on the terms and conditions of bargaining unit members. *Flambeau Airmold Corp.*, 334 NLRB 165, 165 (2001), citing *Alamo Cement Co.*, 281 NLRB 737, 738 (1986); *Carrier Corp.*, 319 NLRB 184, 193 (1995), citing *United Technologies Corp.*, 278 NLRB 306, 308 (1986).

An employer's duty to bargain with the union over mandatory subjects includes a duty to bargain about the effects on employees of a management decision that is not itself subject to the bargaining obligation. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677, 679–682 (1981); *Litton Business Systems*, 286 NLRB 817, 819–821, 1133–1134 (1987), *enfd.* in relevant part 893 F.2d 1128, 1133–1134 (9th Cir. 1990), *cert denied* in relevant part 498 U.S. 966 (1990), *revd.* in part on other grounds 501 U.S. 190 (1991); *Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1368 (4th Cir. 1995), *cert granted* on other grounds 516 U.S. 963 (1995), *affd.* 517 U.S. 392 (1996). In most such situations, “[t]here are alternatives that an employer and a union can explore to avoid or reduce the scope of the [effects] without calling into question the employer’s underlying decision. See *Bridon Cordage Inc.*, 329 NLRB 258 (1999).

The Board has held that “[a]n employer has an obligation to give a union notice and an opportunity to bargain about the effects on union employees of a managerial decision even if it has no obligation to bargain about the decision itself.” *Allison Corp.*, 330 NLRB 1363, 1365 (2000) citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981); *Good Samaritan Hospital*, 335 NLRB 901 (2001). The employer has a duty to give pre-implementation notice to the union in order to allow for meaningful effects bargaining. *Allison Corp.*, *supra* at 1366. It is well settled that Section 8(a)(5) requires effects bargaining to be conducted “in a meaningful manner and at a meaningful time . . . .” *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682 (1981). Effects bargaining must occur sufficiently before actual implementation of the decision so that the union is not presented with a *fait accompli*. *Komatsu America Corp.*, 342 NLRB 649, 649 (2004).

*Is the change to the parking policy a mandatory subject of bargaining?*

The Respondents had offered parking at the prior facility at 615 W. Lafayette, in lots owned by DMP. In 2014, DMP sold the building and the lots, and in October 2014, the newspapers moved to a building that DMP leased. In addition, DMP leased space in two parking garages for employees' use. Neither of those parking garage owners were the owners of the new building.

Shortly before the move, on June 16, 2014, DMP announced a new parking policy by email to employees. Those emails were sent by Jenereaux and Brown. All employees who chose to park at the garages where DMP leased space would be charged more per month than they had previously been charged at the old location. The monthly fees would now be based on salary, rather than flat rates as before. The individual employee's rate would be determined by salary ranges. At best, an employee would pay \$60 per month rather than \$25 or \$30, and at worst, \$175 per month. An employee who opted not to park at either of the employer-provided garages would likely pay more at other local lots, or would have to make other commuting arrangements, such as taking public transportation. In their most recent collective-bargaining agreements, employees of both DFP and DN had gained a one per cent raise per year; the new higher parking costs exceeded those amounts, resulting in a net reduction of wages. The request for a parking space was no longer month-to-month, but an annual commitment. Assignment to the closer garage would be determined by seniority, rather than date of request, as in the past. Although one garage was adjacent to the new building, the other garage was three or four blocks away (whereas the old lots were adjacent or one block away). Employees who worked late hours would not be permitted to move their cars to the closer garage after dark. These changes in distance prompted safety concerns.

The Respondents argue that the changes in the parking policy do not impact the employees' working conditions and therefore it is not a mandatory subject of bargaining. They contend that the changes are de minimis, and compare the instant situation to cases where the employees had to walk an additional 200 yards, or an additional few minutes, or a few extra yards. Those cases are inapposite. The Respondents fail to address the major changes, most significantly the increase in cost.

The Respondents assert that because parking in employer-provided lots is not mandatory, but optional or "a gratuity," parking cannot be a mandatory subject of bargaining. I reject that argument. Parking is a benefit offered to employees by the Respondents, and it is thus a term and condition of employment.

The Respondents assert that there was no change in their relationship with the bargaining unit members as compared to nonbargaining unit members, that they continued to treat both groups the same, offering parking to both groups on the same terms. They argue that, therefore, they maintained the status quo and there was no change in terms and conditions of employment, relying on *Courier-Journal I* and *Courier-Journal II*.<sup>7</sup> Neither case is relevant to the instant situation. In those cases, the collective-bargaining agreements explicitly provided that the

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<sup>7</sup> *Courier-Journal (Courier-Journal I)*, 342 NLRB 1093 (2004); *Courier-Journal (Courier-Journal II)*, 342 NLRB 1148 (2004).

employer would provide health insurance to bargaining unit members on the same terms as nonbargaining unit members, and that any changes made to health insurance would be the same for both. After the contract expired, the employer increased employee premiums for both groups on the same terms. Therefore, the Board found no violation. There was no such provision in either of the instant collective-bargaining agreements regarding parking. A similar defense was rejected by the Board in *Larry Geweke Ford*, 344 NLRB 628 (2005). I reject the Respondents' argument that the status quo was dynamic, and the Respondents merely maintained that status quo by providing parking to bargaining unit and nonbargaining unit members on the same terms.

The Respondents contend that the Union conditioned bargaining on midterm modification of the contracts, and that such midterm bargaining is permissive. It is true that agreeing to a midterm contract modification is permissive. Parking was not covered under either of the collective-bargaining agreements and the Respondents were under no obligation to agree to modify the contracts. However, the Union did not condition bargaining on modifying the contracts; it was merely a proposal which the Respondents could reject. In his requests to bargain about parking, Grieco had consistently referred to the request as a request for effects bargaining, and made no mention of modifying the contracts. The fact that agreeing to a midterm modification is permissive does not make the subject of bargaining about parking as an effect of the decision to relocate the business likewise permissive. The Respondents' obligation to bargain about the effects of changing the parking policy remains.

The Respondents assert that the Union engaged in bad-faith bargaining by insisting on midterm bargaining. However, the cases cited are not on point. As stated above, the Union did not insist on midterm bargaining. It is quite a stretch to consider the simple statement in the Union's July 11 proposal, that the proposal would modify the collective-bargaining agreements, as insistence on midterm bargaining. There was no bad faith on the Union's part, and the Union's statement in its proposal does not serve as "a complete defense" to the allegations against the Respondents.

I find that Respondent DMP had the right to make the management decision to relocate the businesses – when to move, where to move, and related matters including whether to purchase or lease the new facility and parking lots. However, certain potential effects of that decision are material, substantial and significant—in this instance, much of the parking lot policy, i.e., monthly rate, based on salary, costing much more than the prior location and erasing the newly-gained wage increases, requiring an annual commitment, and assigning garages by seniority. Those aspects of the new parking policy significantly disadvantaged employees, compared to the old location.

I find that the above-noted changes to the parking policy are material, substantial and significant changes. They are, therefore, mandatory subjects of bargaining, and the Respondents had an obligation to bargain with the Union over those effects of the relocation.

*Did Respondent DMP provide the Union with prior notice and a meaningful opportunity to bargain over the new parking policy?*

The Union did not receive notice of the new policy prior to its issuance to employees on June 16, 2014; neither Grieco nor any other union official received advance notice. In fact,

Grieco received the email from a bargaining unit member, despite his June 10 email to Anger, Wolman, and Plain, noting the Union's right to bargain about changes to parking arrangements or costs, and requesting information about parking at the new location.

5 Once the policy was announced on June 16, Grieco immediately requested to engage in effects bargaining about the changes. The Respondents agreed to meet with the Union on July 11 to discuss the Union's concerns about parking. Whether that meeting was a bargaining session or a meeting is not simply a matter of semantics, as Respondents DFP and DMP suggest.

10 It is undisputed that Behan began the July 11 meeting by stating his position that the Respondents were under no obligation to bargain about the parking policy. He and Vercruysse explained, in detail, the reasons for their position. It is likewise undisputed that Behan ended the meeting by stating that the parking policy would be implemented. Vercruysse then stated that employees must sign up for parking by the July 21 deadline.

15 At that meeting, Grieco gave the Respondents copies of the Union's initial proposal. He stated that he assumed the parking policy that had been issued was the Respondents' initial proposal. However, he and Storeygard both testified that Behan (or Vercruysse) said it was not a proposal but the benefit they were offering. (Tr. 422, 785-786.) Gallagher testified that both  
20 Behan and Vercruysse said that no bargaining was taking place, that it was not a bargaining session. (Tr. 662, 670.) Behan said they were there simply to talk about the parking issue. (Tr. 671-672.) Storeygard testified that Behan and Vercruysse both said they would not bargain. (Tr. 730.) She said Behan said that the meeting was a courtesy, as they were under no obligation to bargain about parking, but they would look at the Union's proposals. (Tr. 728.) Vercruysse did  
25 not testify but Behan did not rebut this testimony. He merely testified that he often stakes out a position at the beginning of a bargaining session but does not necessarily maintain that position. It is important to note that this was not a meeting to negotiate an entire contract, covering multiple areas of interest. The meeting was solely to discuss the new parking policy. Therefore, such strategies employed in contract negotiations are inapplicable, as the situations are not  
30 comparable.

The Respondents dismissed the Union's first three proposals with no discussion. Behan stated, as to disabled employees, that the Respondents had already made a decision how to handle them, by allowing them to park in the closer garage at the cost of the cheaper garage. The  
35 Respondents did not make a concession<sup>8</sup> or agree to the Union's proposal regarding those employees; they simply advised the Union of a decision they had already made prior to the meeting. Regarding company cars, the Respondents indicated they planned to keep the two cars each, but could make no commitments as to the future. The Union noted ongoing concerns about vehicle maintenance. As to employees moving their cars to the closer garage at night, the  
40 Respondents rejected that as well, though they explained that was because the employees leased spaces in a specific garage. There was a discussion about security, and Behan explained what the plans were, as to shuttle vans and escorts. Vercruysse said that, as to the company cars and photographer parking, the policy was a work in progress that was evolving. The Respondents

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<sup>8</sup> The Respondents emphasized Grieco's notice to unit members, wherein he indicated that the Respondents had made a concession regarding disabled employee parking. His use of that word does not make it so. Obviously, he was trying to save face and put the best spin on what had occurred.

made no counteroffers, but simply said no to the Union's proposals. At best, they presented the parking policy on a take-it-or-leave-it basis. The entire meeting lasted less than one hour.

After the meeting, and in the Union's absence, the Respondents further discussed safety and security issues regarding photographers, and again made an independent decision how to handle their parking. They also checked on vehicle maintenance as a result of the Union's concerns in that regard. The Respondents did not advise the Union of any changes to the parking policy that they made after the July 11 meeting.

As the Respondents assert, it is true that they do not have to agree to a proposal in order for bargaining to occur. But they made no counteroffers, they did not move from the policy they had already announced to the employees, other than the unilateral modifications as to disabled employees and photographers.

The mere fact that union officials entitled their notes of the July 11 session "bargaining notes," or referred therein to "bargaining," does not mean that bargaining in fact occurred, as the Respondents argue. Rather, I must consider the circumstances as a whole.

The Respondents also made much of the fact that the Union terminated the meeting on July 11 and never again requested to bargain about parking. It is apparent that this was done after the Union saw that there was no point in continuing the meeting, as the Respondents were not bargaining.

I find that the Respondents met, but did not bargain, with the Union over the changes in the parking policy. The Respondents agreed to meet to discuss the Union's concerns about parking. Discussing concerns about the already announced policy is not bargaining. At that July 11 meeting, the Respondents emphasized that they had no obligation to bargain about parking. They said the policy that had been announced was not a proposal but the benefit they were offering. At the end of the meeting, the Respondents stated that the parking policy would be implemented. This amounts to presentation to the Union of a fait accompli. While the Respondents permitted the Union to present proposals, the Union was not provided the opportunity for meaningful bargaining. The Respondents had already determined what the new policy would be, announced it to the employees, and only agreed to meet with the Union to discuss its concerns, as a courtesy. The Respondents made it very clear to the Union at the meeting that they were not going to bargain. The Respondents did not bargain but maintained their position that the policy was set, and would be implemented, with minor revisions that they unilaterally determined as well.

I find that the Respondents did not notify the Union of the changes to the parking policy before the new policy was announced to all employees on June 16. I find that the Respondents presented the Union with a fait accompli and failed to bargain when the Union requested it. I find that bargaining did not occur at the July 11 meeting. The new policy was implemented in October 2014. Therefore, the Respondents did not provide the Union with prior notice and an opportunity for meaningful bargaining over the changes to the parking policy.

*Did the parties' past practice regarding parking relieve the Respondents of any obligation to bargain?*

Over the years, the Respondents have made periodic changes to the parking arrangements offered to the bargaining unit members. The Respondents cite numerous instances in which they changed the parking arrangements in the past and the Union did not request bargaining. They assert that this established a past practice so that they have discretion to make unilateral changes to parking policy.

To establish past practice, the Respondents must show that the practice occurred with “such regularity and frequency that employees could reasonably expect the ‘practice’ to continue or reoccur on a regular or consistent basis.” *Sunoco, Inc.*, 349 NLRB 240, 244 (2007), citing *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353–354 (2003); *Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999).

However, the Respondents did not regularly or frequently change parking arrangements. No similar changes regarding parking had been made at any time in the past. The Respondents did not regularly or frequently change the parking rates, or the basis on which the rates were set. Costs had changed only rarely over the decades. Most of the instances noted involve closure of a facility and the resulting cessation of offering parking at that facility when employees were reassigned, which is not comparable to this situation. One other instance was noted: closure of the surface lot at Third and Fort Streets in January 2014, for the downtown employees at 615 W. Lafayette. When the Union learned of the closure from concerned employees, Grieco requested information from Mark Brown, most importantly regarding safety issues. That information was provided and no grievance or unfair labor practice charge was filed. DFP Exh. 6. The other two lots were still available on the same terms. That situation is likewise not comparable to the changes at issue here. The Union is not challenging the Respondents’ right to close the parking lots associated with 615 W. Lafayette. It wanted to bargain about the effects on parking arrangements of relocation of the businesses. In any event, changes of any kind to parking arrangements had not been made by the Respondents on a regular or frequent basis.

I find that the Respondents did not establish a past practice regarding parking that relieves them of the obligation to bargain with the Union.

#### *Did the Union Waive Its Right to Bargain?*

To establish waiver, the employer has the burden to show that the union “clearly intend[ed], express[ed], and manifest[ed] a conscious relinquishment” of its right to bargain. *United Cable Television Corp.*, 296 NLRB 163, 167 (1989); *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991), *enfd.* 984 F.2d 1562 (10th Cir. 1993); see also *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 314 (D.C. Cir. 2003). Waiver of a statutory bargaining right is not lightly inferred from contractual language, and the employer asserting this waiver bears the burden of establishing that the union has clearly and unmistakably relinquished that right. *Ohio Power Co.*, 317 NLRB 135, 136 (1995), citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Register-Guard*, 301 NLRB 494, 495 (1991); *American Benefit Corp.*, 354 NLRB 129 (2010); *Provena St. Joseph Medical Center*, 350 NLRB 808, 810–812 (2007). Rather, there is a presumption that the Union has not abandoned rights guaranteed by the Act. *Pertec Computer*, 284 NLRB 810, 817 (1987).

The management-rights clauses in these contracts do not address parking, and do not preclude negotiating about parking. The Board does not construe general management rights and integration clauses as constituting clear, unequivocal, and unmistakable waivers of statutory rights. See *Provena*, supra at 822; *Ohio Power Co.*, supra at 136, citing *Johnson-Bateman Co.*, 295 NLRB 180, 184–185 (1989); *Outboard Marine Corp.*, 307 NLRB 1333, 1338 (1992). Further, the Board has taken the position that the employer has an obligation to bargain over effects even though language in the management-rights clause constitutes a waiver of the union’s right to bargain over the decision itself. *Good Samaritan Hospital*, 335 NLRB 901 (2001).

In this instance, parking is not covered by either collective-bargaining agreement and it is not listed in the side agreements as a benefit that must be maintained for the life of the contract. However, there is no express waiver of the right to bargain about parking in either contract. The mere fact that a topic is not covered by a collective-bargaining agreement is insufficient to establish waiver. *Provena*, supra. Therefore, no language in the contracts relieves the Respondents of the obligation to engage in bargaining regarding certain effects of the relocation, i.e., parking.

Respondents DFP and DMP contend that the Union waived its right to bargain by failing to bargain, citing *American Diamond Tool* and *Boeing Co.*<sup>9</sup> Those cases are inapplicable. The Union did not fail or refuse to bargain; rather, Grieco repeatedly requested to bargain. He arranged a date on which to meet with the Respondents to bargain. It was the Respondents who failed to bargain at that meeting or thereafter. The Union terminated the July 11 meeting when it was clear that the Respondents did not intend to bargain but were holding fast to the policy that had previously been announced, with one modification regarding disabled employees that was likewise unilaterally decided.

Waivers of statutory rights may also be established through examination of the parties’ bargaining history, but only if the issue has been fully discussed and consciously explored during negotiations and the Union has consciously yielded or clearly and unmistakably waived its interest. *Ohio Power Co.*, supra at 136, citing *Johnson-Bateman Co.*, supra at 185.

The Respondents herein assert that the Union waived its right to bargain about parking, since it has never made a written proposal about parking in past collective-bargaining negotiations. The parties agree that the Union made no written proposals but did make an oral proposal regarding parking security in the 2010 negotiations. That proposal was then withdrawn. That is insufficient to establish waiver of the statutory right to engage in bargaining. First, it has not been established that the parties in fact “fully discussed and consciously explored” parking issues. Second, neither party had ever made a proposal regarding the factors to be considered in determining how parking rates would be assessed and spaces assigned. Therefore, I conclude that the parties did not fully discuss and consciously explore the topic, and the Respondents have not shown that the Union consciously yielded or clearly and unmistakably waived its right to engage in effects bargaining regarding the new parking policy.

The Board has consistently held that “a union’s acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.”

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<sup>9</sup> *American Diamond Tool, Inc.*, 306 NLRB 570 (1992); *Boeing Co.*, 337 NLRB 758 (2002).

*Owens-Brockway Plastic Products*, 311 NLRB 519, 526 (1993), citing *Owens-Corning Fiberglass*, 282 NLRB 609 (1987), *Dubuque Packing Co.*, 303-NLRB 386 (1991).

In sum, I find that the current collective-bargaining agreements do not contain an explicitly stated, clear and unmistakable waiver of the Union's right to engage in effects bargaining over the change in parking policy. I further find that the parties' bargaining history does not establish that the Union waived its right to bargain over the change in that policy. I therefore find that the Respondents have not met their burden of establishing that the Union waived its right to engage in effects bargaining over the parking policy.

For the reasons stated above, I find that the Respondents made a unilateral change that is material, substantial, and significant when the new parking policy was announced on June 16, 2014, and subsequently implemented in October 2014.

I conclude that the Respondents' conduct violated Section 8(a)(5) and (1) of the Act as alleged.

#### CONCLUSIONS OF LAW

1. The Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in direct dealing with bargaining unit members by announcing a new parking policy on June 16, 2014, without providing the Union notice and a meaningful opportunity to bargain, the Respondents Detroit Free Press and Detroit News, through their agent Respondent Detroit Media Partnership, have violated Section 8(a)(5) and (1) of the Act.

4. By engaging in direct dealing with bargaining unit members by announcing the extension of the deadline for submitting parking preferences on July 2, 2014, and bypassing the Union, the Respondents Detroit Free Press and Detroit News, through their agent Respondent Detroit Media Partnership, have violated Section 8(a)(5) and (1) of the Act.

5. By failing to afford the Union prior notice and a meaningful opportunity to bargain over the effects of its decision to relocate the business, specifically parking policy, the Respondents Detroit Free Press, Detroit News and their agent Detroit Media Partnership have violated Section 8(a)(5) and (1) of the Act.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall order them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It cannot be determined what the result would have been had timely effects bargaining occurred. However, a bargaining order alone is an inadequate remedy for the Respondents' refusal to bargain with the Union. Meaningful bargaining cannot be assured without restoring some measure of bargaining power to the Union and some inducement to the Respondents as to this issue. Therefore, I shall order the Respondents to restore the status quo ante, upon request by the Union rescind the new parking policy, compensate affected bargaining unit members for their economic losses, and, on request, bargain collectively and in good faith with the Union before implementing any changes in the parking policy.

The standard remedy in effects bargaining cases is a limited make-whole *Transmarine* remedy, as clarified in *Melody Toyota. Transmarine Navigation Corp.*, 170 NLRB 389 (1968); *Melody Toyota*, 325 NLRB 846 (1998). A *Transmarine* remedy requires an employer to bargain over the effects of its decision and to provide employees with limited backpay from 5 days after the date of the decision until the occurrence of one of four specified conditions. See *Transmarine*, supra at 390.

The purpose of accompanying the order to bargain with a limited backpay remedy is two-fold: it is "designed both to make whole the employees for losses suffered as a result of the violation and to recreate, in some practicable manner, a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent." *Transmarine*, supra at 390. Making employees whole is the lesser consideration of the two. "Secondly, and more importantly, the *Transmarine* and other similar 8(a)(5) remedies are designed to restore at least some economic inducement for an employer to bargain as the law requires." *O.L. Willis, Inc.*, 278 NLRB 203, 205 (1986). This recognizes that, in these cases, the employees represented by the Union have already been affected, and the urgency of the situation triggering the bargaining obligation has passed.

Effects bargaining cases typically involve an employer's failure to bargain over the effects of closing a facility, mass layoffs, or otherwise removing bargaining unit work. However, a *Transmarine*-type remedy may be ordered when a unilateral change does not result in a loss of jobs but otherwise causes economic losses to unit employees. Thus, for example, in *Rochester Gas & Electric*,<sup>10</sup> the Board found appropriate a *Transmarine*-type remedy where the employer made a unilateral change in the vehicle benefit that it afforded employees. Therein, the employer ceased to permit maintenance employees to take vehicles home overnight; making that decision was determined to be within its authority. However, it was found that the employer had failed to meet its obligation to engage in effects bargaining with the union, and was ordered by the Board to pay employees' increased commuting costs.

Here, the Respondents violated their obligation to provide the Union with prior notice and an opportunity to engage in timely bargaining about the effects of the decision to relocate the businesses, specifically, the parking policy, which significantly affected the employees' take-home pay.<sup>11</sup> The Respondents' unfair labor practice thus deprived the Union of "an opportunity

<sup>10</sup> *Rochester Gas & Electric Corp.*, 355 NLRB No. 086 (2010) enfd *Electrical Workers Local 36 v. NLRB*, 706 F.3d 73 (2d Cir. 2013).

<sup>11</sup> Parking costs were a pretax deduction from employees' paychecks.

to bargain ... at a time ... when such bargaining would have been meaningful in easing the hardship on employees” whose income was being cut. *Transmarine*, supra at 389. Had the Respondent engaged in timely effects bargaining, the Union may have been able to secure additional benefits for affected employees. See *Live Oak Skilled Care & Manor*, 300 NLRB 1040, 1042 (1990) (“[I]t is reasonable to require that ‘the employees whose statutory rights were invaded by reason of the Respondent’s unlawful . . . action, and who may have suffered losses in consequences thereof, be reimbursed for such losses until such time as the Respondent remedies its violation by doing what it should have done in the first place’”). Further, in *Transmarine*, the Board recognized that, in these circumstances, merely ordering the Respondents to engage in effects bargaining would be a pro forma remedy. Because the Respondents have implemented the policy change and thus relieved the pressures that motivated them to do so, “meaningful bargaining cannot be assured without restoring some measure of bargaining power to the Union in relation to the issue.” *Rochester Gas*, supra at 508.

The Respondents assert that granting this relief is imposing a contract term on the parties. On the contrary, it merely returns the parties to the situation they were in when the Respondents refused to negotiate with the Union. It is not likely that the parties will agree to a rate of \$25 or \$30 when they do negotiate, as the circumstances have changed, and it is not for me to decide what terms they will reach.

Therefore, I will order that Respondents bargain with the Newspaper Guild of Detroit, Local 34022, on request, over the effects of the decision to relocate the businesses, specifically the parking policy.

Further, I will order a limited make-whole remedy designed to make any affected bargaining unit members whole for any losses they suffered as a result of Respondents’ failure to bargain about the effects of the decision to relocate the businesses, specifically the parking policy. For each affected bargaining unit member, Respondents shall pay the difference between the employee’s current paycheck deduction for parking and the rate the employee previously paid (\$25 or \$30 per month) from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) Respondents bargain to agreement with the Union about the parking policy; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 days after receipt of Respondents’ notice of their desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith. However, in no event shall the sum paid to any employee be less than the value of the difference in parking rates for a 2-week period.

The amounts due shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Since the parking fees are pretax paycheck deductions, the Respondents shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondents shall also compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards in a calendar year other than the year in which the income would have been earned had the Act not been violated. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>12</sup>

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## ORDER

The Respondents, Detroit Free Press, Detroit News, and Detroit Media Partnership, located in Detroit, Michigan, and their officers, agents, successors, and assigns, shall

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## 1. Cease and desist from

(a) Dealing directly with the bargaining unit members regarding parking policy, without providing the Union notice and a meaningful opportunity to bargain.

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(b) Bypassing the Union and dealing directly with bargaining unit members regarding the deadline for submitting parking preferences.

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(c) Failing to timely notify the Newspaper Guild of Detroit, Local 34022, and afford it a meaningful opportunity to bargain over the effects of the decision to relocate the businesses, specifically parking policy.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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## 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the status quo ante with respect to parking arrangements by rescinding the new parking policy, and advise the employees in writing or via email of the rescission.

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(b) Jointly and severally make affected bargaining unit members whole by reimbursing them for any losses suffered as a result of the change to the parking rates, as set forth in the remedy section of this decision.

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(c) Compensate affected bargaining unit members for the adverse tax consequences, if any, of receiving lump-sum backpay awards in a calendar year other than the year in which the income would have been earned had the Act not been violated.

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(d) File a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for each employee.

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<sup>12</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) On request, bargain collectively with the Newspaper Guild of Detroit, Local 34022, as the exclusive representative of the employees in the following appropriate units regarding the effects of the decision to relocate the businesses, specifically the parking policy.

The bargaining unit at the Detroit Free Press:

All full-time and regular part-time news and editorial employees, including editorial aides, editorial interns, editorial research assistants, artists, copy editors, reporters, photographers, designers, web producers, photo lab assistants, assistant editors, head copy editors, picture editors, editorial writers, web editors, and web developers.

The bargaining unit at the Detroit News:

All full-time and regular part-time news and editorial employees, including reporters, photographers, artists, copy editors, digital editors, rewrite employees, page designers, wire editors, picture supervisors, degree librarians, editorial assistants, secretaries, clerks and student interns.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at their facility in Detroit, Michigan, copies of the attached notice marked "Appendix."<sup>13</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, any of the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a

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<sup>13</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

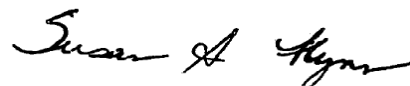
copy of the notice to all current employees and former employees employed by the Respondents at any time since June 16, 2014.

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(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 12, 2015

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A handwritten signature in cursive script, reading "Susan A. Flynn".

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Susan A. Flynn  
Administrative Law Judge

## **APPENDIX**

### **NOTICE TO EMPLOYEES**

**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### **FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT undermine and bypass the Newspaper Guild of Detroit, Local 23022 (the Union) and deal directly with you regarding changes to wages, hours, or terms and conditions of employment, without providing the Union notice and a meaningful opportunity to bargain.

WE WILL NOT unilaterally implement new parking policies without affording the Union prior notice and offering the Union the opportunity to bargain collectively in good faith.

WE WILL NOT refuse to bargain collectively in good faith with the Union over any proposed changes in your wages, hours, and terms and conditions of employment before implementing such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, if requested by the Union, rescind any or all changes to the parking policy that we implemented in October 2014 without bargaining with the Union, and advise you in writing of such rescission.

WE WILL, before implementing any changes in your wages, hours, or other terms or conditions of employment, notify and, on request, bargain collectively with your Union, which is the exclusive collective-bargaining representative for our employees in the following appropriate bargaining units:

The bargaining unit at the Detroit Free Press:

All full-time and regular part-time news and editorial employees, including editorial aides, editorial interns, editorial research assistants, artists, copy editors, reporters, photographers, designers, web producers, photo lab assistants, assistant editors, head copy editors, picture editors, editorial writers, web editors, and web developers.

The bargaining unit at the Detroit News:

All full-time and regular part-time news and editorial employees, including reporters, photographers, artists, copy editors, digital editors, rewrite employees, page designers, wire editors, picture supervisors, degree librarians, editorial assistants, secretaries, clerks and student interns.

WE WILL pay you for your out-of-pocket losses incurred as a result of the changes that we made to the parking rates without bargaining in good faith with the Union.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate you for the adverse tax consequences, if any, of receiving lump-sum backpay awards in a calendar year other than the year in which the income would have been earned had the Act not been violated.

**THE DETROIT FREE PRESS,  
INCORPORATED  
THE DETROIT NEWS, INC.  
DETROIT MEDIA PARTNERSHIP**

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(Employers)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. Hearing impaired persons may contact the Agency's TTY service at 1-866-35-NLRB. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

**477 Michigan Avenue, Room 300, Detroit, MI 48226-2543  
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.**

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/07-CA-132726](http://www.nlrb.gov/case/07-CA-132726) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3200.